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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION AND BANK OF BOSTON CORPORATION

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Questions Presented

1. When Congress has "balkanized" banking by barring interstate bank acquisitions while expressly authorizing states to make exceptions by specific legislation, does a state law exercising this authority offend the negative implications of the dormant Commerce Clause if it lifts the congressional barrier only within its own geographical region, where nothing in Congress' authorizing language requires a state's action thereunder to disregard an acquiring company's state of origin and where Congress, when enacting its barrier and authorizing states to lift it without qualification, was fully aware that there was support for a regional approach?

2. Does the Compact Clause require after-the-fact congressional approval of parallel state laws that, at most, coordinate their respective states' exercises of Congress' express grant of authority, where those state laws create no new governmental entity, mount no challenge to federal supremacy, alter no state's sovereign powers, place no burdens on any state beyond those imposed by Congress itself, and create no effects distinct from those that the same states could create without any cooperation or agreement with one another?

Parties To The Proceeding

The caption of the case in this Court lists all parties to the proceeding. Bank of New England Corporation, CBT Corporation and Hartford National Corporation each have no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1. The listing required for Bank of Boston Corporation by Rule 28.1 appears in Appendix A to the Brief Of Respondent Bank Of Boston Corporation In Opposition To Petition, with the following additions:

Advent Capital Limited (United Kingdom)

CombiNet

Linguaphone Holdings PLC (United Kingdom)

Pearce Technology Limited (United Kingdom)

South East Asia Venture Investment Company, N.V. (Singapore)

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BRIEF OF RESPONDENTS BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION AND BANK OF BOSTON CORPORATION

Intervenor-Respondents Bank of New England Corporation ("BNE"), CBT Corporation ("CBT"), Hartford National Corporation ("HNC") and Bank of Boston Corporation ("BBC") (collectively the "private respondents") submit this brief in opposition to the constitutional challenges of peti-

tioners Northeast Bancorp Inc., Union Trust Company (collectively, "Northeast") and Citicorp to the Orders of the Board of Governors of the Federal Reserve System (the "Board") approving the applications of BNE to merge with CBT, HNC to acquire Arltru Bancorporation, and BBC to acquire Colonial Bancorp, Inc. (the "Orders"), affirmed by the United States Court of Appeals for the Second Circuit.

Statement of the Case

To reverse the decision below, this Court would have to embrace the wholly novel conclusion that states exceed their constitutional and statutory authority when—pursuant to express congressional authorization—they partially lift a federally-imposed barrier to interstate commerce.

It is undisputed that, in the Douglas Amendment to the Bank Holding Company Act of 1956,[1] Congress placed a logjam in the stream of interstate commerce by prohibiting bank holding companies from acquiring banks located in other states. Nor is it disputed that Congress simultaneously and explicitly empowered the states to lift this barrier by enacting statutes specifically authorizing such interstate acquisitions of in-state banks. And it is further undisputed that the particular bank acquisitions challenged here are, as the Douglas Amendment requires, "specifically authorized by the statute laws" of Massachusetts and Connecticut.

Petitioners build their entire case upon one feature of those statutes: the fact that each removes the congressionally-erected barrier only with respect to New England states which offer reciprocal acquisition privileges to Massachusettes or Connecticut institutions. Unable to find violations of the Commerce and Compact Clauses in what these states have *done*, petitioners seek to establish violations in what the two states have chosen *not* to do. The purported violations consist of the allegedly collective and conspiratorial *omissions* of Connecticut and Massachusetts to lift the federal barrier to interstate bank acquisitions with respect to states outside New England.

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1 12 U.S.C. § 1842(d) ("Section 3(d)" or the "Douglas Amendment").

Petitioners thus ask this Court to discern constitutional violations in the states' failure to adhere to a "norm of national economic unity" that was emphatically rejected by Congress in the Douglas Amendment itself.

A. The Bank Holding Company Act And Its Historical Antecedents.

The American banking system, which today encompasses some 42,000 depository institutions (including nearly 15,000 commercial banks), has long been distinctive for its decentralized structure and its strong emphasis on local control of banking and credit.[2] Our decentralized, fragmented banking system is a reflection of the belief—deeply engrained in American consciousness since the early Nineteenth Century—that control over credit should remain diffused and that the public interest is best served by locally-controlled, community-oriented financial institutions.[3]

This Court itself has recognized that, "both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern."[4] The development and preservation of locally-based banking institutions have, since at least the Jacksonian era, been deemed important to ensure that the credit and service requirements of local businesses and consumers are properly considered and met.[5]

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2 *See Geographic Restrictions on Commercial Banking—the Report of the President*, Dep't of the Treasury, 1 (January 1981) ("*Geographic Restrictions on Commercial Banking*"). Financial power in other major Western nations is concentrated in the hands of a few large centralized banking institutions. In England, for example, commercial banking is dominated by the so-called "Big Five." In Canada, the entire nation is served by only 11 commercial banks. R. Syron, *The "New England Experiment" in Interstate Banking*, New England Ec. Rev. 5, 6 (March/April 1984) ("*Syron*") (*reproduced in* Joint Appendix in the Second Circuit—"JA (2d Cir.)"—2411.

3 *Geographic Restrictions on Commercial Banking* at 1.

4 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

5 *See, e.g.*, B. Hammond, *Banks and Politics in America* 326-29, 335-36 (1957); M. Madeline, *Monetary and Banking Theories of Jacksonian Democracy* 11 (1943).

Both the states and the federal government have taken steps to foster local control of banking institutions. At one time, many states wholly prohibited the operation of branches by their own state-chartered banks,[6] and even today a number of states maintain geographic limitations on bank branching[7]. Meanwhile, Congress in the McFadden Act, as amended in 1933, precluded all *interstate* branching by national banks and authorized *intrastate* branching by such banks only to the extent that state-chartered banks in the same state are permitted to branch.[8] Congress thus ensured that a national bank charter could not be used to avoid state branching restrictions, thereby leaving—as this Court previously has recognized—"the desirability of branch banking up to the States."[9]

The McFadden Act ultimately proved insufficient to contain the ambitions of aggressive bankers who resorted to the holding company device as a means of avoiding the federal prohibition on interstate branching. Through holding company structures, a number of major banking organizations acquired banks located outside their home states, establishing extensive interstate networks.[10] Congress viewed this development as a grave threat to the traditional American system of locally-controlled banking institutions oriented towards serving the needs of their communities.[11]

As a result, in the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.* (the "BHC Act"), Congress addressed

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6 *E.g.*, 68 Cong. Rec. 2833 (1926) (statement of Rep. Goldsborough); *id.* at 3232-33 (statement of Rep. Williamson).

7 *E.g.*, Ill. Const. Art. 13, § A (Smith-Hurd 1971); Minn. Stat. Ann. § 48.34 (West Supp. 1984).

8 12 U.S.C. § 36(c). See n.31.

9 *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966).

10 *E.g.*, 102 Cong. Rec. 6858 (1956) (remarks of Sen. Douglas) (describing interstate expansion of various bank holding companies).

11 *E.g.*, H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2 (1955) (*substantial excerpts reproduced in* Joint Appendix—"Jt. App."—A5-A7); 102 Cong. Rec. 6857-60 (1956) (*substantial excerpts reproduced in* Jt. App. A10-A16) (remarks of Sen. Douglas); 102 Cong. Rec. 8228-29 (1955) (remarks of Rep. Patman).

the subject of bank acquisitions[12] by bank holding companies[13] in general and *interstate* bank acquisitions in particular. In Section 3 of the BHC Act, Congress provided that a bank holding company may not acquire a bank without prior Federal Reserve Board approval.[14] In Section 3(d) of the BHC Act—the so-called Douglas Amendment—Congress expressly prohibited the Board from approving a bank holding company's acquisition of a bank located outside the holding company's home state *unless* such an acquisition is "specifically authorized by the statute laws of the State in which such bank is located by language to that effect and not merely by implication."[15] Congress, as this Court has observed, thus established a "general *federal* prohibition" of interstate bank acquisitions and empowered the states—in the words of Senator Paul Douglas, the amendment's principal sponsor—to *create exceptions* to this federal ban[16] "to the degree" that they wished.[17] Congress thereby sought to stem the flow of out-of-state bank holding companies across the states' borders—a phenomenon that threatened the tradition of community-oriented banking—and to enable the states to control future entry by out-of-state banking organizations. The revolution in interstate nonbank financial services that has occurred in the years since the Douglas Amendment was enacted[18] has, if anything, increased the importance of Congress' original de-

12 As used in the BHC Act, a "bank" is an institution organized under federal or state law which accepts deposits that the depositor has a legal right to withdraw on demand, and also engages in the business of making commercial loans. 12 U.S.C. § 1841(c).

13 A "bank holding company" is a company that has or acquires control over one or more banks. 12 U.S.C. § 1841(a)(1).

14 12 U.S.C. § 1842(a).

15 12 U.S.C. § 1842(d).

16 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis added).

17 102 Cong. Rec. 6858 (*reproduced in* Jt. App. A13).

18 *See, e.g.*, Ginsburg, *Interstate Banking*, 9 Hofstra L.Rev. 1133, 1175-76, 1185-1219 (1981).

sign that the states have the power to control interstate bank acquisitions.[19]

B. The Actions Of Massachusetts, Connecticut And The Other New England States Under The Douglas Amendment.

The Massachusetts Act was passed in December, 1982.[20] It authorizes out-of-state bank holding companies based in the other five New England States to acquire Massachusetts banking organizations, provided that the acquiror's home state accords reciprocal acquisition privileges to Massachusetts institutions. In June 1983, Connecticut passed a similar statute,[21] culminating five years of consideration of interstate banking.[22]

Prior to passage of the Acts, neither Massachusetts nor Connecticut had exercised the authority conferred by the Douglas Amendment. *All* acquisitions of Massachusetts and Connecticut banks by out-of-state bank holding companies were prohibited by the Douglas Amendment. The challenged statutes thus *permit* interstate commerce between Connecticut and Massachusetts, and potentially among as many as six New England states, where previously such commerce had been prohibited by federal law.

None of the other New England states deals with interstate bank acquisitions as do Massachusetts and Connecticut. Rhode Island has enacted a similar statute whose regional feature expires on June 30, 1986: Rhode Island will then permit acquisition of its banks by any out-of-state bank holding company whose home state (like New York) accords reciprocal privileges to Rhode Island banking institutions.[23] Maine's stat-

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19 See pp. 33-35, 38-39, *infra*.

20 Mass. Ann. Laws ch. 167A § 2 (West Supp. 1982) (the "Massachusetts Act") (Appendices To Petition For Writ Of Certiorari—"Pet. App." —A101-A102).

21 1983 Conn. Acts, Pub. Act No. 83-411 (Reg. Sess.) (the "Connecticut Act") (Pet. App. A99).

22 See pp. 35-37, *infra*.

23 R.I. Gen. Laws §§ 19-30-1, 19-30-2.

ute permits entry by out-of-state bank holding companies throughout the nation even if their home states do not accord reciprocity to Maine banks.[24] Vermont and New Hampshire have not enacted interstate bank acquisition statutes; in those states, the Douglas Amendment continues to prohibit acquisitions by *all* out-of-state bank holding companies.[25]

C. Proceedings Below.

After passage of the Massachusetts and Connecticut Acts, Massachusetts-based BNE agreed to merge with CBT, a Connecticut bank holding company; HNC, another Connecticut bank holding company, agreed to acquire Arltru Bancorporation, a Massachusetts bank holding company; and BBC of Massachusetts agreed to acquire Connecticut-based Colonial Bancorp, Inc. Applications for approval of these transactions were submitted, as required by law, to the Federal Reserve Board.

Over petitioners' objections that the Acts violated the Commerce and Compact Clauses of the Constitution,[26] the Board approved the transactions. It concluded that the Connecticut and Massachusetts Acts provide the specific state statutory authorization required by the Douglas Amendment (Pet. App. A37, A74, A83) and that there is no adequate basis to declare the Acts unconstitutional (Pet. App. A38-A41, A49-A71, A74-A75, A83). In rejecting petitioners' Commerce Clause claims, the Board concluded: "[n]othing in the history of the . . . Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry" (Pet. App. A71). The Board thus adhered to its longstanding interpretation that the Douglas Amendment authorized the states

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24 Me. Pub. Law 1983, ch. 302, § 2, as amended (1984) (*further* discussed at n.69).

25 See n. 85.

26 U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); art. I, § 10, cl. 3 (Compact Clause).

to permit interstate bank acquisitions on a selective basis. *Id.*[27]

The Board did *not* find that the New England states had entered into any actual agreement or confederation (Pet. App. A51-A52). It recognized that, even if the Acts were to be considered part of an "implicit" compact or agreement, they would violate the Compact Clause only if they "enhance[d] state powers *at the expense of federal supremacy*" (Pet. App. A52) (emphasis added). Because the Douglas Amendment reflects a congressional decision to allow the states to determine which, if any, interstate bank acquisitions are to be permitted within their borders (Pet. App. A52), the Board rejected petitioners' Compact Clause challenges.

On appeal, the Second Circuit affirmed the Orders, noting that the Acts promote, rather than restrict, interstate commerce (Pet. App. A29). Recognizing that the Douglas Amendment departed profoundly from the notion of a single national economic unit, the Court of Appeals held that, "if Congress authorizes the states to regulate some aspect of interstate commerce"—as Congress has clearly done in the Douglas Amendment—"any action taken by a state within that authority is 'invulnerable' to challenge" (Pet. App. A30) (*quoting Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 652-53 (1981)).[28] As to the Compact Clause, the Court of Appeals concluded that, even if the Acts were "treated as a compact," there is no threat of encroachment upon "the just supremacy of the United States" that would violate the Compact Clause (Pet. App. A31-A32). In this regard, the Second Circuit deferred to the Board's conclusion that the Douglas Amendment constitutes "a 'renunciation of federal interest in regulating interstate acquisi-

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27 See n.77.

28 The Second Circuit found no support for petitioners' claims that Congress had intended to restrict the states' authority to lift part way the general federal prohibition on interstate bank acquisitions imposed by the Douglas Amendment (Pet. App. A28-A29).

tions of banks by bank holding companies' " (Pet. App. A29).[29]

Summary of Argument

The gravamen of petitioners' constitutional attacks on the Connecticut and Massachusetts Acts is that the legislatures of those states, in not giving wholesale approval to all interstate bank acquisitions, and in experimenting instead with regional freedom of acquisition, unconstitutionally discriminated between New England bank holding companies and those located in other states. Petitioners contend that, when one state fails to override in full a federal exclusion from its borders of companies based in the other states, such *in*action violates the Commerce Clause; and that, when two states make parallel and reciprocal omissions of this sort without express congressional approval of the combined result, there is *collective* inaction that violates both the Commerce and Compact Clauses.

Petitioners rely on a form of "dormant Commerce Clause" analysis that is manifestly inappropriate in this novel context. Congress, by the Douglas Amendment and other banking legislation, has dramatically departed from the national "common market" that petitioners champion. The Douglas Amendment by its literal terms prohibits all interstate bank acquisitions unless the states enact exceptions to the federal prohibition. Connecticut and Massachusetts have availed themselves of this opportunity to experiment with a regional approach to such bank acquisitions.

Viewed against this background of congressionally-imposed obstruction of interstate commerce and discrimination against

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29 Petitioners' argument that the Second Circuit deferred to a constitutional adjudication of which the Board itself professed doubts (Brief of Citicorp, "CitiBr.", at 9-10; Brief of Northeast, "NEBr.", at 9) misreads the Second Circuit's opinion. That opinion establishes that the court below gave substantial deference not to any constitutional judgment, but rather to the Board's longstanding and plainly reasonable interpretation of a provision of federal banking law—the Douglas Amendment. (Pet. App. A29) (*quoting Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 2979 (1984)).

out-of-state corporations, the challenged statutes represent an *expansion* of interstate commerce. Additional congressional authorization for the states' omission to lift the federal barrier more broadly and uniformly is unnecessary. This Court's precedents precluding casual inference of congressional authorization for discriminatory or obstructive state legislation are inapposite, since Congress has gone beyond mere abdication of the field and has *itself*—in petitioners' phrase—"balkanized" bank acquisitions along state lines. Since Congress "awakened" the Commerce Clause by emphatically rejecting the norm of national unity in the Douglas Amendment—opting instead to empower the states to control interstate bank acquisitions—the negative implications of the dormant Commerce Clause no longer apply.

Thus, there simply is no basis for concern in this case as to whether Congress has "authorized" states to *leave in place*, by their complete or partial inaction, any "discriminatory" *federal* exclusions that flow from a statutory ban that Congress has itself enacted. And, in any event, the results achieved by the combination of the Douglas Amendment with what Massachusetts and Connecticut have both done—and omitted to do—fall well within the range of what Congress contemplated.

Nor is the Compact Clause in any way implicated, for the challenged statutes neither constitute nor reflect an interstate compact requiring express congressional approval. In independently enacting their admittedly parallel statutes, Connecticut and Massachusetts have created no new entity within the federal system. And the regional approach to banking made possible by the two challenged statutes engenders no threat to federal supremacy, for Congress itself partitioned the nation into myriad isolated bank acquisition zones when it passed the Douglas Amendment. Since they partially ameliorate this federally-imposed fragmentation, the Acts are actually steps toward national unification that Congress expressly authorized the states to pursue.

Petitioners' Compact Clause challenge ultimately depends upon a showing that the New England states have *agreed* to the regional limitations contained in their respective Acts. Even assuming *arguendo* that some of those states have "agreed" to

open their borders to each other's bank holding companies, there is no basis whatsoever for inferring any agreement among such states to exclude the bank holding companies of other states. None of the New England statutes requires, as a condition to reciprocity, that other states' statutes include *any* regional limitation. To the extent that non-New England bank holding companies may be barred from acquiring Connecticut or Massachusetts banks, that exclusionary effect derives from the Douglas Amendment. At the very most, the purported exclusion is attributable to *unilateral* actions of the individual states, and not to any agreement that implicates the Compact Clause—petitioners' penchant for "conspiracy" theories notwithstanding.

Argument

I. CONGRESS "BALKANIZED" THE NATION'S BANKING SYSTEM BY A FEDERAL BAN THAT IT EXPRESSLY AUTHORIZED THE STATES TO LIFT.

Petitioners contend that the Douglas Amendment does not manifest Congress' intent to displace dormant Commerce Clause norms in the area of interstate bank acquisitions. Petitioners thereby ask this Court to ignore that Congress, in the Douglas Amendment and other statutes, has effected a geographic fragmentation of banking that is the very antithesis of the dormant Commerce Clause. Petitioners would also have this Court ignore that Congress, as the legislative history of the Douglas Amendment makes clear, empowered the states to lift the pre-existing federal barrier to interstate bank acquisitions in order to preserve states' rights: Congress left the states free to calibrate the permissibility of interstate acquisitions of their banks "to the degree" that the states desired.

A. Having Determined That A Geographically Fragmented Banking System Best Serves The National Interest, Congress Erected A Federal Barrier To Interstate Banking.

In the Douglas Amendment, Congress—as this Court previously has stated—established "a general *federal* prohibition on the acquisition or expansion of *banking* subsidiaries across

state lines" by bank holding companies.[30] Prior to the enactment of the Douglas Amendment, Congress had undertaken through the McFadden Act and related legislation to prohibit branch banking on an interstate basis.[31] These branching restrictions proved inadequate to contain interstate expansion through the holding company mechanism.[32] In an effort to preserve the long-established American preference for a locally-controlled and community-oriented banking system, Congress enacted the Douglas Amendment.[33]

By the Douglas Amendment and the McFadden Act, Congress has intentionally compartmentalized the nation's banking structure into separate units along state lines, unambiguously establishing that, in banking, local control and community orientation shall take priority over unrestrained interstate commerce, and that economic units far smaller than the entire nation shall be the norm.[34] Indeed, Congress' intent to dictate

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30 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis added).

31 In addition to prohibiting interstate branching by national banks in the McFadden Act (see p. 4, *supra*), Congress in the Federal Reserve Act (12 U.S.C. § 321) applied the McFadden Act's branching restrictions to state-chartered banks that are Federal Reserve System members. Similarly, the National Bank Act provides that national banks may consolidate only with other banks located within the same state. 12 U.S.C. §§ 214-215a.

32 See p. 4, *supra*.

33 As Senator Douglas explained, the "immediate practical effect" of his Amendment was "to bar the expansion of bank holding companies across State lines." 102 Cong. Rec. 6860 (*reproduced in* Jt. App. A15); *accord id.* at 6859 (*reproduced in* Jt. App. A15).

34 *See Geographic Restrictions on Commercial Banking* at 1 (noting that the Douglas Amendment and the McFadden Act reflect a congressional determination to balkanize the American banking system on a geographic basis along state lines).

Congress' decision to do so, of course, is not subject to Commerce Clause challenge. The Commerce Clause vests Congress with plenary power to regulate interstate commerce in any manner not inconsistent with other specific constitutional provisions. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The only prohibition of state legislation in the Commerce Clause derives from its negative implications. As construed by this Court, the

the geographic fragmentation of banking along state lines could not be more clear. A state that desires the exclusion of out-of-state bank holding companies need take *no* action; Congress itself has imposed such exclusion.[35] Thus, in the Douglas Amendment, Congress did not merely abandon the field to the states; it stood the dormant Commerce Clause on its head, by *affirmatively imposing* economic balkanization.

This extraordinary displacement of dormant Commerce Clause norms did not go unrecognized when Congress considered the Douglas Amendment. Opponents attacked the amendment on the very ground that it imposed "discrimination" against out-of-state bank holding companies as a matter of federal law unless the states acted affirmatively to relieve that "discrimination." During the floor debate, Senator Bennett criticized the amendment because it

> makes a blanket prohibition which can only be lifted by specific affirmative action by the States. . . .
>
> The net effect of the amendment is to require every State that does not now have legislation prohibiting bank holding companies to discriminate in favor of such corporations that may be resident in their State and against bank holding companies resident in any other State and requires affirmative legislation to remove the discrimination.

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so-called dormant Commerce Clause reflects an implicit judgment that, *in the absence of congressional action*, interstate commerce should be free from state-imposed inhibitions and discrimination. *E.g.*, *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-71 (1976). When Congress chooses to act, however, it is not bound by the negative implications of the Commerce Clause. *E.g.*, *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434 (1946). This Court has repeatedly upheld federal statutes which prohibit interstate commerce where Congress has determined that such a prohibition is in the national interest. *E.g.*, *United States* v. *Darby*, 312 U.S. 100 (1941) (excluding from interstate commerce goods manufactured in plants whose employees' wages and hours did not meet federal standards); *Hipolite Egg Co.* v. *United States*, 220 U.S. 45 (1911) (upholding ban on interstate transportation of impure food); *Champion* v. *Ames*, 188 U.S. 321 (1903) (upholding legislation banning interstate transportation of lottery tickets).

35 Conversely, if a state wishes to permit entry, it must act affirmatively to relieve the congressionally-imposed discrimination against interstate commerce. See pp. 27-29, *infra*.

> So far as I can learn, no State has of its own volition, and by action of its own legislature, set up such discrimination. . . .
>
> [T]he effect of this amendment . . . [would be] to require discrimination in interstate commerce, and then leave it to the several States to correct it. . . .

102 Cong. Rec. 6860 (*reproduced in* Jt. App. A16-A17); *accord* 102 Cong. Rec. 6861 (1956) (remarks of Sen. Bricker).

In enacting the Douglas Amendment over these objections, Congress was well aware that, by imposing a complete barrier to an important form of interstate commerce, it was departing in the most extreme manner from the dormant Commerce Clause norm of a single national economic unit. Indeed, the legislative history of the BHC Act confirms that Congress imposed this unique scheme because it deemed the suppression of interstate commerce in bank acquisitions essential to the preservation of local control over banking.

The House of Representatives had passed a version of the BHC Act in 1955 in which it sought to preserve smaller, locally-responsive and community-oriented banks.[36] Many Representatives were concerned about "preserv[ing] our free enterprise banking system" of geographically dispersed banks, which they perceived as "a vital factor in the development of

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36 In the debate which preceded the House's passage of this bill, this was a crucial point:

> It is hard to believe that a branch of a gigantic corporation, with its headquarters many miles away will have the sympathetic understanding of the needs of a community as does the local bank which is so definitely a part of the community life.

101 Cong. Rec. A 2454 (1955) (remarks of Rep. Wier).

> [W]hat this bill is designed to attack, and to rectify, is the situation under which decent American citizens far removed from your town and my town, completely unfamiliar with the economies of our communities and not a bit interested except for the dividends that can be siphoned out of them can control our banks and the source of credit in our communities; they have the power—if they have the resources—to make decisions affecting the life blood of our local economies.

Id. at 8030 (remarks of Rep. Rains).

the United States."[37] The use of the holding company device to circumvent branch banking restrictions "threatened to destroy" that "democratic grass roots institution"—the smaller, community-oriented bank—and "thereby to facilitate concentration of credit facilities" which "would have a revolutionary effect upon the free enterprise system"; the House's version of the BHC Act therefore included an absolute prohibition of interstate bank acquisitions.[38]

Although he proposed a different approach to interstate bank acquisitions, Senator Douglas shared the concerns expressed in the House.[39] The Senator described his amendment as being "in the true American tradition" of "prevent[ing] undue concentration of banking and financial power, and instead keep[ing] the private control of credit diffused as much as possible."[40] Senator Douglas, noting with alarm a trend

37 H.R. Rep. No. 609, 84th Cong., 1st Sess., 2-6 (1955) (*substantial excerpts reproduced in* Jt. App. A5-A7). The House Report went on to describe the operations of the nation's decentralized banking system as follows:

> Like yeast cells in a loaf of bread, each working in its immediate area, our banks scattered throughout the country have cooperated to produce the greatest and most general economic development the world has known.

Id. at 6 (*reproduced in* Jt. App. A7).

38 *Id.* at 1-2, 5-7 (*substantial excerpts reproduced in* Jt. App. A5-A6); *accord* 101 Cong. Rec. 4407 (remarks of Rep. Wier), 3823 (speech of Rep. Rayburn submitted for the Record by Rep. Spence), 8028-29 (remarks of Rep. Patman), 8030-31 (remarks of Rep. Rains), 8033 (remarks of Rep. O'Hara), 8034 (remarks of Rep. Marshall) (1955).

39 102 Cong. Rec. 6860 (*reproduced in relevant part in* Jt. App. A15-A16). Senator Douglas' remarks on the Senate floor include the observation that credit was becoming concentrated through the use of the bank holding company device "to get around restrictions on branch banking." *Id.* at 6858 (*reproduced in* Jt. App. A14). His remarks also include a lengthy review of the expansion of large bank holding companies across state lines, a development he viewed with great concern. *Id.* (*reproduced in* Jt. App. A14-A15).

40 *Id.* at 6857 (*reproduced in* Jt. App. A10). Senator Douglas went on to note:

> For we know that when the credit resources of a country become concentrated and fall into a few hands, then the industry and trade of

toward concentration in American banking fueled by a number of "big mergers,"[41] declared that the previously unfettered interstate expansion of bank holding companies had to be checked in order to preserve smaller, community-oriented banks from competition with, and acquisition by, the large money center bank holding companies.[42]

B. In Deference To State Autonomy, Congress Expressly Authorized The States To Lift The Federal Barrier Selectively.

In adopting the Douglas Amendment, Congress, acting in deference to the Senate's concern about states' rights, rejected an *absolute* ban on interstate bank acquisitions that the states could not lift. Petitioners' contention that Congress never expected the states to lift the federal barrier—and hence gave no thought to how the states might do so[43]—is flatly contradicted by the legislative history. That history makes plain that, in empowering the states to raise the federal barrier to interstate acquisitions, Congress intended to restore to the states a measure of their traditional control over banking.

1. Congress Recognized That The Douglas Amendment Authorizes The States To Lift The Federal Barrier.

Although the House of Representatives had first passed a total ban on interstate acquisitions,[44] the Senate Committee on

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that country also become concentrated.

Big banks commonly find it much easier and more to their liking to do business with big business rather than with little business.

Id.

41 *Id.* at 6857-58 (*reproduced in* Jt. App. A12-A13). Significantly, among the then-current "big mergers" which Senator Douglas criticized was the combination of National City and First National Bank in New York to form Citibank (*id.*), the predecessor and principal subsidiary of petitioner Citicorp.

42 Senator Douglas stated:

> [T]he big holding companies, freed from the restraint of my amendment, would undoubtedly keep far ahead of the rest of the pack. These are unequal races, in which the strong usually outdistance the weak.

102 Cong. Rec. 6860 (1956).

43 CitiBr. at 24; NEBr. at 24-25.

44 See pp. 14-15, *supra*.

Banking and Currency reported out a bill that permitted interstate bank acquisitions subject only to approval by the Federal Reserve Board. The Senate Committee bill's treatment of interstate bank acquisitions had won little support,[45] while the House bill's *total* ban on interstate bank acquisitions was attacked as "an unwarranted interference with states' rights."[46]

The dispute was resolved by Senator Douglas' compromise amendment. As proposed and enacted, the Douglas Amendment borrowed the House bill's prohibition of interstate bank acquisitions, but in order to satisfy Senate sensitivities as to states' rights, it empowered the states, if they desired, to lift the federal barrier.[47]

Any doubt as to whether Congress understood that it was affirmatively authorizing the states to lift the federal barrier cannot survive Senator Douglas' remarks to the Senate: because "[a]t present no State specifically grants such permission," "the *immediate* practical effect [of the amendment] would be to bar the expansion of bank holding companies across State lines."[48] "But the amendment *would leave the way open for states to make explicit provision for such purchases and acquisitions if they so decided.*"[49] "Therefore the amend-

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45 That approach was supported by large bank holding companies interested in interstate expansion. *E.g., Control of Bank Holding Companies, 1955:* Hearings on S.880, S.2350, and H.R. 6227 before the Subcomm. of the Sen. Comm. on Banking and Currency, 84th Cong., 1st Sess. 132, 136 (testimony of Ellwood Jenkins), 139 (testimony of John Noonan), 268 (testimony of Arthur B. Tyler), 298 (testimony of Bayard F. Pope). These large companies opposed the Douglas Amendment. 102 Cong. Rec. 6860 (remarks of Sen. Douglas).

46 *Id.* at 6752 (*reproduced in* Jt. App. A8) (remarks of Sen. Robertson, floor manager for the Senate Committee's bill, *quoting* Sen. Maybank).

47 Senator Douglas stated:

> Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States.

Id. at 6860 (*reproduced in* Jt. App. A15); *accord id.* (*reproduced in* Jt. App. A16-A17) (remarks of Sen. Bennett); *id.* at 6862 (*reproduced in* Jt. App. A20) (prepared statement of Sen. Payne).

48 *Id.* at 6860 (*reproduced in* Jt. App. A15) (emphasis added).

49 *Id.* (*reproduced in* Jt. App. A15-A16) (emphasis added).

ment does not freeze the situation."[50] In light of this express recognition that the states were free to permit interstate bank acquisitions, petitioners' claim that Congress assumed that the states would not use their authority is as inaccurate as it is immaterial.

2. *Congress Empowered The States To Lift The Federal Barrier Selectively To Suit Their Own Policies.*

Petitioners' further contention that Congress did not consider how the states might go about exercising their congressionally-conferred power is also rebutted by the legislative history. Senator Douglas explained during the floor debate that, under his amendment, bank holding companies would be permitted to acquire banks in other states "*only to the degree*" that such acquisitions were "permitted by State laws."[51] In describing the Douglas Amendment's effect on interstate bank acquisitions, Senator Douglas made repeated analogy to the McFadden Act's subjection of national banks to state branching restrictions:

> [B]y the McFadden Act and other measures, national banks have been permitted to open branches *only to the degree permitted by State laws* and State authorities.
>
> * * *
>
> [W]hat our Amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our Amendment will permit out-of-State holding companies to acquire banks in other States *only to the degree that State laws expressly permit them* . . . .
>
> * * *
>
> [S]o far as interstate acquisition of banks is concerned . . . the provision in my Amendment is in principle almost identical with the present provision which governs branch banking.
>
> Therefore, it is a logical continuation of the principles of the McFadden Act which tried to prevent Federal

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50 *Id.* at 6860.

51 *Id.* at 6858 (*reproduced in* Jt. App. A13) (emphasis added).

> power from being used to permit national banks to expand across State lines in a way contrary to State policy . . . .

102 Cong. Rec. 6858, 6860 (*reproduced in* Jt. App. A13, A16)(emphasis added).

Petitioners assert that the Senator's use of the term "only to the degree" refers not to the *qualitative* extent of any state's power to lift the federal bar, but only to the *number* of states that might choose to to do so.[52] Petitioners engage in similar wishful thinking when they seek to render the analogy meaningless on the ground that the McFadden Act does no more than establish "competitive equality" between federally- and state-chartered banks.[53] These arguments misread both the McFadden Act and the legislative history of the Douglas Amendment.[54]

Congress, in adopting the McFadden Act in 1927, liberalized *federal* restraints on national bank branching, but also chose, as this Court has recognized, "to leave the question of desirability of branch banking [by national banks] up to the states."[55] Attempts between 1927 and 1933 to amend the McFadden Act to allow national bank branching regardless of state law were, as this Court has noted, "strenuously opposed and eventually defeated"; and, with the passage of the Banking Act of 1933, Congress once again determined that national bank branching should be allowed " 'in only those States the

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52 CitiBr. at 28; NEBr. at 26. Not surprisingly, petitioners never seek to reconcile this creative reading (which would suggest that Senator Douglas recognized that any number of states might remove the federal barrier to interstate bank acquisitions) with their contention that the sponsors of the Douglas Amendment did not contemplate that even a single state would raise the federal barrier (see p. 16, *supra*).

53 CitiBr. at 28; NEBr. at 26-27.

54 Petitioners' argument is also contradicted by the fact that, as Senator Douglas expressly noted in his remarks, the states had adopted a multiplicity of restrictions of intrastate bank branching, ranging from total prohibition (Illinois) to creation of separate banking zones (New York, as described in n.64). 102 Cong. Rec. 6858 (*reproduced in* Jt. App. A14). At this time, Pennsylvania permitted branching in contiguous counties. *Upper Darby Nat. Bank* v. *Myers*, 386 Pa. 12, 124 A.2d 116 (1956).

55 *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966).

laws of which permit branch banking, and only *to the extent that the State laws permit branch banking.*' "[56]

Thus, Senator Douglas, by arguing that his amendment brought the McFadden Act approach to the area of interstate bank acquisitions, was explaining that his amendment allows interstate bank acquisitions only insofar as they are permitted under state law, just as national banks are permitted to branch intrastate only to the degree that their home states' laws expressly permit. Thus, the Douglas Amendment was intended to make state law determinative as to whether *interstate* bank acquisitions by bank holding companies should be permissible in the same way that the McFadden Act made state law determinative as to the permissibility of *intrastate* branching by national banks.[57]

Petitioners' claim that Congress never considered the scope of the authorization to lift the federal barrier is plainly contradicted by the remarks of Senator Douglas and Senator Payne, a co-sponsor of the Douglas Amendment. Senator Douglas declared that his amendment should be supported by "[a]nyone who favors States rights."[58] Senator Payne articulated the sponsors' belief that "the control of expansion of bank holding companies across State lines . . . is a matter of primary concern to the State governments and *is an area best left to their discretion. . . .*" 102 Cong. Rec. 6862 (1956) (*reproduced in* Jt. App. A20) (emphasis added).[59]

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56 *Id.* at 259 (emphasis added) (*quoting* Senator Glass, 76 Cong. Rec. 2511 (1933)).

57 *First National Bank* v. *Dickenson*, 396 U.S. 122, 131 (1969) (in the McFadden Act, "state law has been utilized by Congress to provide certain guidelines to implement its legislative policy"); *First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 99 (7th Cir.), *cert. denied*, 444 U.S. 950 (1979) ("[t]he policymaking role in [the] area [of branch banking] is given to the state legislatures").

58 102 Cong. Rec. 6860 (*reproduced in* Jt. App. A16).

59 Contrary to petitioners' claim that the private respondents' reading of the Douglas Amendment is based on a "few ambiguous comments of Senator Douglas" (CitiBr. at 27; *accord* NEBr. at 25-26), our conclusion as to Congress' intent in the Douglas Amendment is grounded upon a lengthy floor debate over the merits of this single provision of the BHC Act, which included the extensive remarks of four Senators—two co-sponsors and two

There can be little doubt that regional arrangements of the type at issue here are well within the range of the discretion that Congress understood it was conferring on the states. Prior to enactment of the Douglas Amendment, Congress was presented with testimony as to the benefits of a federally-mandated trade-area approach to interstate bank holding company acquisitions.[60] The Committee Report on the House version of the BHC Act specifically noted that Congress had been urged to permit interstate banking operations on, among other things, a "trade-area" or a "Federal Reserve District basis," without regard to the states' own banking laws.[61]

Congress ultimately determined in the Douglas Amendment that the states—not the federal government—should decide how far, if at all, to permit interstate bank holding company acquisitions.[62] Given that determination, it makes perfect sense that Congress itself declined to include in the BHC Act, as a

opponents of the amendment. 102 Cong. Rec. 6856-63 (1956) (*substantial excerpts reproduced at* Jt. App. A9-A20). Petitioners' reliance on precedents in which this Court rejected proffered statutory constructions based on " 'isolated fragments' " of legislative history (CitiBr. at 27; NEBr. at 26) is thus entirely misplaced. *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) (rejecting proposal based on a single expression of "hope" as to how Congress might act); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history" when they are contradicted by "the Reports of both Houses and the statements of other Congressmen").

60 *Control of Bank Holding Companies, 1955: Hearings on S. 880, S. 2350,* and *H.R. 6227 before the Subcomm. of the Sen. Comm. on Banking and Currency*, 84th Cong., 1st Sess. 145 (1955) (testimony of John T. Noonan):

> Restriction of bank holding companies to trade areas such as Federal Reserve Districts would be entirely logical and defensible. Restriction of bank holding companies to the purely historical geographical areas composing the States, however, would appear to have no foundation in logic at all . . . . We find it difficult to see how a Federal Congress empowered by the Constitution to disregard State lines in administering affairs relating to banking and currency can justify this discriminatory treatment of the small States of the country.

61 H.R. Rep. No. 609, 84th Cong., 1st Sess. 2 (1955).

62 See pp. 16-18, *supra*.

matter of federal law, any provision *mandating* a regional approach to interstate bank acquisitions, notwithstanding a state's desire to the contrary.[63] By the same token, Congress plainly was aware that there were active proposals to permit interstate bank acquisitions on a regional basis. This awareness did not lead Congress to limit its grant of authority to the states. On the contrary, it enacted a broadly worded provision that was clearly understood to leave the states free to exercise their own judgment and discretion in this area, including the freedom to pursue regional arrangements.[64] Under these circumstances, state regional approaches are within the realm of acceptable choices that states may make under the Douglas Amendment. At the very least, those who argue that they are without Congress' authorization must bear a heavy burden of explaining why Congress, if its intention was to the contrary, did not simply say so.

Even the petitioners find themselves ultimately unable to contend that no form of selective state lifting of the Douglas Amendment's general prohibition can be sustained.[65] As petitioners recognize, the states have enacted a variety of statutes pursuant to their Douglas Amendment authority, and *none* of these laws fully removes the federal barrier to interstate bank acquisitions. Some states have enacted statutes authorizing interstate acquisitions only by "grandfathered" out-of-state

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63 *Congress'* inclusion of such a provision in the Act would have been antithetical to the prevailing view that the states' policies should hold sway in this area. See pp. 16-18, *supra*. For this reason, petitioners are wide of the mark with their suggestion that the failure of Congress itself to impose interstate bank acquisitions on a trade-area basis reflects an affirmative intent to reject a regional approach to interstate bank acquisitions. Obviously, Congress simply left this issue to be decided by the states in exercise of the discretion granted to them.

64 Nor were the suggestions of a "trade-area" approach the only material that alerted Congress, in considering the Douglas Amendment, to the possibility of regional banking arrangements. In the course of repeatedly analogizing his amendment to the McFadden Act, Senator Douglas specifically noted that New York had divided itself into ten distinct zones for branch banking purposes (102 Cong. Rec. 6858 (*reproduced in* Jt. App. A14-A15)), thereby adopting a regional approach to intrastate expansion.

65 CitiBr. at 37; NEBr. at 30 n.28.

bank holding companies with some prior presence in the state;[66] others have chosen to permit interstate purchases only of failing local banks;[67] and still others have authorized interstate acquisitions only of "special purpose" banks—for example, banks engaged exclusively in credit card operations—on the condition that they provide significant employment for local residents and not compete significantly with locally-controlled, full-service banks.[68] Petitioners do not and could not plausibly deny that each of these other types of laws is discriminatory on its face, for every one of them unquestionably treats some or all out-of-state bank holding companies, by virtue of their status as such, differently from—and more restrictively than—all in-state holding companies.[69]

Petitioners nonetheless seek to distinguish this array of discriminatory legislation from regional statutes because the former supposedly involve less of a burden on interstate commerce.[70] This proposition is dubious in the extreme. For example, the "special purpose" bank statutes for which petitioner Citicorp has successfully lobbied[71]—and which peti-

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66 *E.g.*, Fla. Stat. Ann. § 658.29(3)(d) (West Supp. 1983); Iowa Code Ann. § 524.1805 (West Supp. 1982-83).

67 *E.g.*, Wash. Rev. Code ch. 30.04.230(a).

68 *E.g.*, Del. Code Ann. tit. 5, § 801, *et seq.* (Supp. 1982); Md. Fin. Inst. Code Ann. § 5-903 (Supp. 1983); Va. Code. § 6.1-392 (1983).

69 The remaining types of statutes that a few states have enacted pursuant to the Douglas Amendment are similarly non-uniform and conditional, and therefore, in petitioners' terms, are discriminatory or obstructive in their operation. New York has enacted a statute that permits interstate acquisitions only by out-of-state bank holding companies whose home states permit acquisitions by New York bank holding companies (N.Y. Banking Law § 142-b (McKinney Supp. 1983)); Alaska permits interstate acquisitions by out-of-state bank holding companies only of banks formed before a specified date (Alaska Stat. § 06.05.235 (Supp. 1984)); and Maine imposes on interstate acquisitions capital and "net new funds" limitations that do not apply to intrastate acquisitions (Me. Pub. Law 1983, ch. 302, § 2. as amended, ch. 597, § 3 (1984)).

70 *E.g.*, CitiBr. at 37; NEBr. at 4-5.

71 *See Banks Decontrol Bid In States*, N.Y. Times, Mar. 26, 1983 at 29, col.3 (March 26, 1983); *Inside Citicorp*, N.Y. Times, § 6, at 15, col.3 (May 29, 1983).

tioners understandably take great pains to distinguish—are unmistakably marked by the "local parochialism" that this Court has consistently condemned.[72] It is strange indeed to defend the blatant home-state favoritism embodied in these statutes as less constitutionally suspect than the Connecticut and Massachusetts Acts, which grant no favors to resident banks *vis-a-vis* out-of-state institutions, but at most favor one group of outsiders over another.[73] In any event, the degree of the discrimination against interstate commerce does not distinguish these other types of statutes for constitutional purposes. This Court's decisions make clear that even where a statute's burden on commerce is light, it must "regulate[ ] evenhandedly," and not favor local over out-of-state in-

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72 The Delaware statute, for example, ensures that the acquired local bank will pose no significant competition for locally-based banks by requiring: (1) that it be a newly established rather than an existing bank; (2) that it have only one office in the state; and (3) that it be "operated in a manner and at a location that is not likely to attract customers from the general public," Del. Code & Tit. 5, Section 803 (Supp. 1982). In-state bank holding companies and their bank subsidiaries are not subjected to these statutory shackles. If its local favoritism were not already clear enough, the Delaware law also requires that the newly-acquired special purpose bank provide a certain number of Delaware jobs within one year of opening. *Id.* Few discriminations against out-of-state businesses could be more obvious or more parochial.

73 State action that favors local over out-of-state business interests is particularly suspect under the Commerce Clause, because it creates the fear that the state is engaging in economic protectionism *at the expense of outsiders*, who are not represented in the state legislature that enacted the discriminatory law. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767-68 n.2 (1945); *accord South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U.S. 177, 184-85 n.2 (1938). This concern is inapposite here. *First*, home-state favoritism has been imposed as the norm by Congress itself in the Douglas Amendment, and the challenged Acts, by partially lifting the federal barrier to interstate acquisitions, *reduce*, rather than increase, "*local* parochialism." *Second*, neither Connecticut nor Massachusetts has favored *its own* bank holding companies over unrepresented out-of-state interests. At most, each has favored one group of unrepresented outside interests over another such group. Since there is no regional political body in which New England bank holding companies are represented and New York holding companies are not, petitioners' desperate attempt to transform Commerce Clause antipathy for *local* parochialism into a similar distaste for *regional* parochialism cannot succeed.

terests.[74] *Each* of these other laws enacted pursuant to the Douglas Amendment's authorization involves, on its face, some form of discrimination; none of them even purports to regulate evenhandedly.[75]

The various state statutes championed by petitioners do not violate the Commerce Clause for one reason—because Congress in the Douglas Amendment gave the states authority to lift selectively the amendment's general prohibition of interstate bank acquisitions. If this were not the case, the states would be confronted with an "all or nothing" choice—that is, a choice between permitting acquisitions by all out-of-state bank holding companies on equal terms with in-state banking organizations or not permitting any interstate acquisitions at all. But petitioners themselves have abandoned their earlier advocacy of any such "all or nothing" construction of the Amendment.[76] By urging the validity of other state laws that

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74 *E.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 36-37; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

75 Absent congressional authorization, such facially discriminatory state statutes would in fact be subject to this Court's rule of *per se* invalidity under the Commerce Clause. *See, e.g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

76 *Compare* JA (2d Cir.) 1463-64, 1518-19, 1565-70, *with* CitiBr. at 37 and NEBr. at 30n.28. Contrary to petitioners' position, several *amici* seek reversal of the judgment below by renewing this all-or-nothing argument. *E.g.*, Brief of The Chase Manhattan Corporation at 4, 11, 15; Brief of The New York Clearing House Ass'n, at 10-13; Brief of The State of New York, at 13-15.

There is, if possible, even less merit to the distinct and more extreme position urged by amicus curiae The Bank of New York Co. ("BNY") that, once a state purports to lift the federal barrier even in part, the result is an automatic total lifting of the barrier, by court decision, despite the statute's terms. Brief of BNY, at 6-10. Although BNY's reading would affirm the decision below, it would do so by standing the Douglas Amendment on its head. Under this approach, the legislature of a state which, like Connecticut, had lifted the bar of the Douglas Amendment in part, would subsequently learn that it had unintentionally authorized entry on a far broader basis than it had ever imagined. For this reason, BNY's position would, if adopted by the Court, effect the judicial repeal of the Douglas Amendment's requirement that interstate bank acquisitions be "specifically authorized by the statute laws of the State in which such bank is located *by language to that effect and not merely by implication.*" 12 U.S.C. § 1842(d) (emphasis

partially or selectively leave the federal barrier in place, petitioners have effectively conceded the controlling consideration here: Congress has empowered the states to enact legislation that removes the Douglas Amendment's prohibition for some but not all out-of-state bank holding companies.[77]

This Court itself has specifically recognized that the Douglas Amendment authorizes the states "to *create exceptions*" to the amendment's general prohibition of interstate bank acquisitions.[78] In the challenged statutes, Massachusetts and Connecticut have done no more than to *create exceptions* for interstate acquisitions by bank holding companies based in other New England states that accord reciprocal acquisition privileges to

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added). It would also do extreme violence to the deference to state control of banking that is the heart of the Douglas Amendment. See pp. 18-20, *supra*. BNY's position has been thoroughly considered and emphatically rejected by the Board. *Bank of New York Co.*, 70 Fed. Res. Bull. 527 (1984).

77 This conclusion is consistent with the interpretation of the Douglas Amendment by the United States Court of Appeals for the District of Columbia Circuit —the only court other than the court below that has squarely addressed the Douglas Amendment and its legislative history in a case involving an interstate bank acquisition. In *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), the District of Columbia Circuit expressly held that Congress anticipated "that states might be *selective* in allowing bank holding companies to cross state lines," and considered it "*obvious*" from the legislative history that the amendment's purpose was "to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion *would not contravene state policy*." 511 F.2d at 1296-97 (emphasis added); *accord Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1708 (1984) ("the Douglas Amendment empowered states to *discriminate* among out-of-state holding companies when deciding which could enter") (emphasis added).

Likewise, the Board itself has since 1973 "consistently construed the Douglas Amendment to authorize states to limit or restrict entry by out-of-state holding companies" in removing the amendment's general prohibition of interstate acquisitions. *Bank of New York Co.*, 70 Fed. Res. Bull. 527, 528 (1984); *accord NCNB Corp.*, 68 Fed. Res. Bull. 54, 56 (1982); *General Bancshares Corp.*, 69 Fed. Res. Bull. 802 (1983); *Northwest Bancorporation*, 38 Fed. Reg. 21530, 21531-32 (1973), *aff'd*, *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975). The Board has *never* found such state selectivity to be impermissible.

78 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 47 (emphasis added).

Massachusetts and Connecticut banking organizations, respectively.[79] The Massachusetts and Connecticut Acts thus are entirely appropriate exercises of the authority Congress conferred in the Douglas Amendment.

In establishing the states as policy-making centers for determining whether and to what degree to permit interstate bank acquisitions, Congress departed dramatically from a nationally uniform approach to interstate commerce. Even if the legislative record on this score were not as clear as it is, respect for Congress as a coordinate branch of government precludes a presumption that it took so large a step with its eyes shut, and meant to entrust to the states a more limited authority than its plain language conferred.

C. The Precedents Limiting Judicial Inference Of Congressional Authorization For Discriminatory Or Obstructive State Legislation Are Inapposite Where Congress Itself Has Rejected The Premise Of National Economic Unity.

This Court has never considered congressional displacement of the dormant Commerce Clause in the context of a federal statute, like the Douglas Amendment, which imposes universal

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79 As a consequence, the Massachusetts and Connecticut Acts are entirely consistent with this Court's further observation in *Lewis* that "it is doubtful that [the Douglas Amendment] authorizes state *restrictions* of any nature on bank holding company activities." *Id.* (emphasis added). The Acts do not restrict any in-state activities of bank holding companies once they have entered a state; rather, as contemplated by this Court in *Lewis*, they serve only to create exceptions to the general *federal* prohibition and thereby "*permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Id.* (emphasis in original). Moreover, the Acts concern *bank* acquisitions whereas this Court's holding in *Lewis* was limited to *nonbank* activities of bank holding companies. *Id.* at 44.

Finally, contrary to petitioner Northeast's claim, the Connecticut statute's anti-leapfrogging provisions in no way " 'assert extraterritorial jurisdiction over persons or property' " (NEBr. at 19 n.21) (*quoting Edgar* v. *MITE Corp.*, 457 U.S. 624, 643 (1982)). Those provisions simply regulate the *ownership* of banks located in *Connecticut*; they pose no more of a bar to interstate acquisitions than do the parallel anti-leapfrogging provisions of New York's reciprocity statute, N.Y. Banking Law § 142-b(a)(i) (McKinney's 1983 Supp.), a statute whose validity under the Commerce Clause petitioner Northeast defended before the Board. JA (2d Cir.) 1467-69.

discrimination against interstate commerce, while authorizing the states to alleviate that discrimination if they wish. In light of the Douglas Amendment, this Court's understandable reluctance lightly to infer congressional intent to authorize departures from dormant Commerce Clause norms can have no application.

It is beyond cavil that Congress may exercise its plenary power under the Commerce Clause to "confer[ ] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."[80] Where Congress has done so, "any action taken by a state within the scope of the congressional authority is rendered invulnerable to Commerce Clause challenge."[81] The negative implications of the Commerce Clause simply do not then apply to the states any more than they do to Congress itself.[82] Petitioners' reliance upon precedents holding that such congressional authorization of state legislation must be stated "expressly"[83] or "explicitly"[84] wholly ignores the unique interaction between federal and state law under the Douglas Amendment.

Any "discrimination" said to result from the challenged statutes is not the creation of anything that Connecticut and Massachusetts have done or enacted, but is the *residue* of the congressionally-imposed discrimination that those states have declined to dissipate.[85] Thus, insofar as one may label what

80 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44; *accord Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945) ("Congress has undoubted power to redefine the distribution of power over interstate commerce . . . to permit the states to regulate the commerce in a manner which would otherwise not be permissible").

81 *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 653 (1981).

82 *Id.* at 652-53.

83 *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982).

84 *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. at 653-54.

85 *See Bank of New York Co.*, 70 Fed. Res. Bull. 527 (1984) (the Douglas Amendment, rather than Connecticut law, prohibits a New York bank holding company from acquiring a Connecticut bank); *Mellon Na-*

Massachusetts and Connecticut *omitted to do* as generating burdensome, obstructive or discriminatory consequences, one need find *no* further congressional authorization for these results, since Congress itself imposed them.[86] To whatever degree the demand for clear congressional authorization is understandable as a requirement that the national legislature consider and approve the obstruction or discrimination at issue,[87] that assurance is amply present where Congress has done even *more* by affirmatively *legislating* such discrimination.[88] There simply is no basis in this context for concern as to whether Congress has "authorized" states to *leave in place*—by their complete or partial inaction—"discriminatory" exclusions that would follow as a matter of federal law from the statutory bar that Congress itself has *enacted*.[89]

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tional Corp., 70 Fed. Res. Bull. 441 (1984), *aff'd*, *Girard Bank* v. *Board of Governors*, 748 F.2d 838 (3d Cir. 1984) (application by Pennsylvania holding company to acquire New Jersey bank barred by Douglas Amendment, rather than by New Jersey law). Indeed, the Board, on at least one occasion, has denied an application for approval of an interstate acquisition even though the Attorney General of the target bank's home state had issued an opinion to the effect that the acquisition would not violate state law. Because the acquisition was not expressly permitted on the face of the state statute, the transaction was prohibited as a matter of federal law. *First Bank System, Inc.*, 70 Fed. Res. Bull. 771 (1984) (Montana bank holding company controlled by Minnesota bank holding company is barred by the Douglas Amendment from acquiring Utah bank; Utah statute expressly permits acquisitions by holding companies in Montana, but not by those based in Minnesota).

86 See pp. 11-16, *supra*.

87 *See, e.g.*, CitiBr. at 11, 13, 15, 19, 21, 30-31; NEBr. at 11-12, 20-21, 25.

88 See pp. 11-16, *supra*.

89 As the Douglas Amendment's opponents argued, Congress' establishment of "discrimination" as the norm for interstate bank acquisitions is a "strange approach, out of harmony" with the traditional norm of a national common market. 102 Cong. Rec. 6860 (*reproduced in* Jt. App. A17) (remarks of Sen. Bennett). Congress' decision nonetheless to adopt that approach alters the Commerce Clause analysis. *See White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *Reeves Inc.* v. *Stake*, 447 U.S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *id.* at 815 (Stevens, J., concurring) ("[o]ur cases finding that a

Petitioners ask this Court to be satisfied with nothing less than verbatim congressional authorization of the precise manner in which Massachusetts and Connecticut have exercised their authority to lift the federal ban on interstate bank acquisitions. But nothing in this Court's precedents supports so "talismanic" a requirement.[90] Even where Congress has not *itself* balkanized the country with respect to a sphere of commerce, but has merely indicated a willingness that *states* take such decentralizing action on their own, this Court has held that Congress' removal of the dormant Commerce Clause obstacle to state action permits states to act "subject only to the exceptions *expressly* provided for" by Congress. *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 405, 430-31 (1946) (emphasis added).

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state regulation constitutes an impermissible burden on interstate commerce all dealt with restrictions that adversely affected the operation of a free market" and do not apply where interstate commerce "would never have existed in the first instance" had the state not acted). Under these cases, dormant Commerce Clause norms are of radically reduced significance where the states, far from obstructing or interfering with pre-existing private commerce, have augmented interstate commerce by removing obstacles not of their own creation. By allowing entry by some out-of-state bank holding companies, Massachusetts and Connecticut have clearly augmented interstate commerce and have indeed reduced the degree to which their home-state holding companies are favored over those from outside. See nn. 73, 89.

90 Only last Term, this Court emphasized that "[t]here is no *talismanic* significance" to any particular test for determining when Congress has authorized the states to adopt legislation in a particular area of interstate commerce that would otherwise offend the dormant Commerce Clause; the essential concern simply is that Congress has "*unmistakably evidenced* its intent to do so." *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237, 2242 (1984) (emphasis added). The Douglas Amendment clearly satisfies this standard. See pp. 11-16, *supra*.

Indeed, petitioners fail to note that the 1983 bill sponsored by Senator Tsongas and Representative Frank, which petitioners acknowledge "would have given federal approval to" the Massachusetts and Connecticut Acts (CitiBr. at 7; NEBr. at 7), does not itself satisfy the requirement of minute specificity that petitioners would read into this Court's precedents. That bill would have required only that "the Board shall give effect to any laws" of the six New England states which permit interstate acquisitions involving banks in any of the other New England states. S. 1002, 98 Cong., 1st Sess. (April 7, 1983). Nowhere did the bill expressly sanction discrimination against interstate commerce or reciprocal attempts to lift the federal barrier, as petitioners would require (see citations at n.87).

Following *Prudential*, in *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), this Court rejected the argument that the McCarran-Ferguson Act should be construed so as not to permit a retaliatory state tax that discriminated *among* out-of-state insurers because the McCarran-Ferguson Act, like the Douglas Amendment, did not mention discrimination by state-of-origin. This Court emphasized that it could find no basis for an anti-discrimination "limitation" on the explicitly-authorized state power regarding insurance "in the language or the history of the Act." 451 U.S. at 653. Nor is there any basis to infer any such limitation in light of the balkanization worked by the Douglas Amendment itself.[91] And, in any event, the results achieved by the Douglas Amendment's interaction with what Massachusetts and Connecticut have done—and omitted to do—fall well within the range of what Congress contemplated.[92]

Those cases in which this Court has hesitated, in the absence of clear congressional intent, to infer congressional permission for state obstructions of a free national market are plainly distinguishable. Each of those cases involved a situation in which Congress had not itself enacted a statute expressly designed to make fragmentation and balkanization the norm.[93]

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91 See pp. 11-15, *supra*.

92 See pp. 16-27, *supra*.

93 In the precedents upon which petitioners rely where this Court rejected congressional authorization claims, the claims were based on federal non-pre-emption and other savings clauses which did no more than leave standing whatever valid state laws had previously existed or on other federal provisions which created federal policies as to federal instrumentalities or federal property without addressing state action as such. None of the federal statutes at issue in these cases barred interstate commerce as does the Douglas Amendment. *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237 (1984) (Congress, in mandating in-state processing of timber taken from *federal* lands, did not authorize a parallel restrictive in-state processing requirement imposed by state law with respect to *other* than federal lands); *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 388 n.15 (1983) (no specific federal

Reluctance to permit such a result where it was not legislated by Congress itself—*and* not clearly within the scope of a congressional grant of authority to the states—makes eminent sense in terms of enforcing a presumption of national unity as a negative implication of the dormant Commerce Clause. But when the Commerce Clause has been "awakened" and its negative implication unmistakably rejected by Congress as a matter of positive federal law, judicial reticence to allow the evolution of subnational economic units would make no sense at all. Worse, it would represent a clearly impermissible imposition of a judicial preference for a unitary nationwide system where Congress—in an undoubted exercise of its constitutional power to do so[94]—has instead opted for a less centralized approach. It is *that* course, proposed by petitioners, and not the one taken by the Second Circuit, that would "arrogate[ ] Congress' policy-making function" to the federal judiciary.[95]

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clause); *Sporhase* v. *Nebraska*, 458 U.S. 941, 959 (1982) (clauses of 37 federal statutes—saving state water rights statutes from pre-emption by the federal enactments and subjecting questions concerning water rights that arise in relation to federal projects to pre-existing valid state laws—do not empower a state to restrict exportation of groundwater); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982) (in § 201(b) of the Federal Power Act, "Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy; by its plain terms, § 201(b) simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise 'lawful' "); *United States* v. *Public Utilities Commission*, 345 U.S. 295, 304 (1953) (federal statute embodied only a congressional grant of power to a *federal* agency).

Section 7 of the BHC Act constitutes a non-pre-emption clause:

> The enactment by the Congress of [the BHC Act] shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. § 1846. As this Court has stated, Section 7 of the BHC Act "was intended to preserve existing state regulations of bank holding companies, even if they were more restrictive than federal law." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 48-49 (emphasis added). The existence of this provision itself precludes construing the Douglas Amendment as would petitioners—that is, as nothing more than an acknowledgment of *otherwise* valid state laws.

94 See n. 34.

95 CitiBr. at 13; *see id.* at 30, 49; NEBr. at 12.

II. THE MASSACHUSETTS AND CONNECTICUT ACTS EFFECTUATE THE POLICY OF LOCAL CONTROL THAT ANIMATES THE DOUGLAS AMENDMENT.

The Douglas Amendment was enacted to preserve local access to and control over banking and credit in the face of the assault by large bank holding companies on the barriers to interstate branch banking imposed by the McFadden Act and related legislation.[96] For some years following the amendment's passage, interstate barriers remained largely intact and state control over local banking systems was maintained. But in the past decade, the localized banking system has once again come under attack from a variety of quarters, notwithstanding the restraints imposed by the Douglas Amendment and the McFadden Act.

Since the beginning of the 1970s, there has been a considerable expansion in the authority of bank holding companies to own and operate so-called "nonbank subsidiaries"[97] engaged in such bank-related activities as consumer and commercial finance, mortgage lending, and lease financing.[98] Because the acquisition and establishment of such nonbank subsidiaries are not restricted by the Douglas Amendment or the McFadden Act,[99] larger bank holding companies have used such subsidiaries to extend their operations far beyond the borders of their home states.[100] Indeed, petitioner Citicorp alone now operates

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96 See pp. 4-6, *supra*.

97 Under Section 4 of the BHC Act, bank holding companies are generally prohibited from owning stock in companies other than banks, but may own companies that provide services found by the Board to be "so closely related to banking . . . as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8).

98 In amending the BHC Act in 1970, Congress expanded the Board's authority to determine the nonbank activities in which bank holding companies may engage. *See generally* JA (2d Cir.) 2415.

99 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44.

100 *See id.; Ginsburg, Interstate Banking*, 9 Hofstra L. Rev. 1133, 1175, 1185 (1981); Frieder, *Legislating For Interstate Bank Expansion; Financial Deregulation and Public Policy*, 9 J. Corp. Law 673, 687-79, App. V-XI, XV (1984).

in forty-one states, largely through a web of nonbank subsidiaries.[101]

Although such nonbank subsidiaries were the initial means by which large banking organizations have invaded local banking systems since 1956, they are no longer the only such device. Technology has contributed significantly to this process; the development of interstate networks of automatic teller machines—which have been held not to constitute impermissible interstate banking operations[102]—has further eroded interstate barriers. Nor are large banking organizations the sole force behind such erosion. Some of the most severe effects can be traced to "the emergence of far-flung networks of outlets that organizations such as Sears, Merrill Lynch, Shearson/American Express and many others" have created "to compete on a local level with services" that banks traditionally have provided—but which are free of the federal restrictions applicable to banks.[103]

Thus, despite Congress' efforts in the Douglas Amendment and elsewhere, large banking and nonbanking companies are increasingly and aggressively moving to establish extensive

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101 See affidavit of Walter J. Connolly, Jr., in Opposition To Petitioners' Request For A Stay in the Second Circuit ("Connolly Affidavit"), Jt. App. A23. All told, bank holding companies operate more than 5,800 nonbanking offices throughout the United States. *See* Syron, Table 2 (JA (2d Cir.) 2416). Indeed, even as this brief is being completed, Citicorp is seeking to work out an arrangement whereby Maryland would amend its interstate bank acquisition statute (see n. 68) so as to permit Citicorp to convert its existing special purpose bank subsidiary into a full service bank—with the result that Citicorp would become the only out-of-state bank holding company permitted to operate such a bank in Maryland. *N.Y. Times*, March 9, 1985, at p. 29.

102 *See, e.g., Independent Bankers Association* v. *Marine Midland Bank*, Nos. 84-7424, 7448 (2d Cir. Feb. 27, 1985).

103 JA (2d Cir.) 1236. The money-market mutual fund is the most prominent product that such nonbanking organizations have successfully marketed throughout the nation in direct competition with local banking institutions.

interstate financial systems. There is no sign that this process will soon abate; if anything, it appears to be accelerating.[104]

The legislators who enacted the Connecticut and Massachusetts Acts were well aware of these developments. The creativity of money-center bankers and the pace of technological change have not altered the desire of such legislators that their states and communities continue to be served by locally-controlled and community-oriented banking systems, as the Douglas Amendment makes possible, rather than only by the local outlets of large, distant financial conglomerates.[105] The task confronting these legislators was the preservation of some semblance of local orientation in their banking systems in the midst of a rapidly changing banking environment.

The regional approaches taken by the challenged statutes reflect Connecticut's and Massachusetts' attempts to strike a balance among the need to retain locally-oriented banking institutions,[106] the goal of strengthening those indigenous enti-

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104 The most recent attempt to avoid interstate banking restrictions is the "nonbank bank"—a financial institution that either accepts demand deposits or makes commercial loans, but not both—and thus is not considered a bank for purposes of the BHC Act. 12 U.S.C. § 1841(c) (*described* at n.11). *See generally* Syron at 7 (JA (2d Cir.) 2417) Also see n. 98.

105 For example, the legislators who enacted the Connecticut Act considered it important "not only to Connecticut banking but to the entire economy [of the] state and the business community of [the] state that [Connecticut] banking institutions [remain] in business as home grown Connecticut banking institutions." JA (2d Cir.) 1259-60 (remarks of Conn. Sen. Schneller). Similarly, the Hebb Commission Report, which was prepared for the Connecticut legislature and led to the introduction of the Connecticut Act (see n. 112), stressed the desirability of maintaining, to the extent possible, a locally-oriented banking system: "To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and business would not . . . serve our state well." JA (2d Cir.) 1240.

106 [T]he regional interstate banking approach can be expected to be responsive to regional economic needs and development. This expectation is based upon the fact that asset and liability sources of regional banks are more interdependent, vis-a-vis the asset [and] liability sources of money center banks. . . . [A]sset allocation criteria would

ties so that they are not ultimately overwhelmed by the awesome resources of remote money-center banks,[107] and the desire to invite outside competition so as better to serve local banking needs.[108] Those statutes were enacted with a clear appreciation that full-fledged interstate banking might well be inevitable.[109] In light of the historical, cultural and financial ties that bind their region together across state lines, Massachusetts and Connecticut have sought through the Acts to provide an opportunity for the development of at least some locally- and regionally-based banking organizations that have the resources to compete effectively against the nation's largest financial concerns, whose interstate activities are increasing.[110]

The regional approach to bank acquisitions embodied in the Acts is in the nature of an experiment. In 1983—in the wake of a presidential report that recommended "*a phased relaxation*

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necessarily be more responsive to the region in which these banks operate.

Frieder, *An Orderly Transition To Interstate Banking*, 164 *The Bankers Magazine*, Mar./Apr. 1981, 47, 52.

107 *See* JA (2d Cir.) 1240-1242.

108 JA (2d Cir.) 1239, 1243.

109 As the Connecticut Act's chief state senate sponsor remarked: "[W]e know that sometime in the future we're going to have interstate banking. It's just a question of time . . . ." JA (2d Cir.) 1273 (remarks of Sen. Sullivan). This point was in fact made repeatedly during the course of the Connecticut legislature's consideration of the Act. *E.g.*, JA (2d Cir.) 1252 (remarks of Sen. Sullivan); JA (2d Cir.) 1327 (remarks of Rep. Kezer).

110 Thus, the Connecticut Act was specifically advocated as "legislation . . . that . . . allows our Connecticut banks to get into the merger process with some banks of their equal size and, hopefully, within the next few years, will enable them to develop the kind of muscle and financial strength to be able to compete on a national basis . . . ." JA (2d Cir.) 1259 (remarks of Sen. Schneller). Likewise, the Act's state senate sponsor emphasized that the legislation was intended to "give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking" so that they can "still provide the service, the loan power of the banks that we have in Connecticut today to our Connecticut consumers." JA (2d Cir.) 1252 (remarks of Sen. Sullivan); *accord* JA (2d Cir.) 1315, 1333, 1335 (remarks of Rep. Onorato).

of current geographic restraints"[111]—the Hebb Commission, established in 1979 by the Connecticut General Assembly to study interstate banking,[112] decided that "to expose our smaller banks to the rigors of unlimited competition from large out-of-state banking organizations . . . would not be wise."[113] In deference to the congressionally-endorsed interest in "promotion of local ownership and control of banks [and] the preservation of a close relationship between those in our communities who need credit and those who provide it[114]—and in recognition of the "natural economic and cultural community of interest among the New England states that would make . . . an experiment in regional banking a reasonable first step toward interstate banking"[115]—the Hebb Commission concluded that it was first "necessary to assess the impact of out-of-state entry upon Connecticut banks in a more limited experiment in interstate banking."[116] The General Assembly concluded its five-year review of interstate banking by adopting the Commission's recommendations.[117]

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111 *Geographic Restrictions on Commerical Banking* at 17 (emphasis in original). Congress had required preparation of this Report in the International Banking Act of 1978, 12 U.S.C. § 611 *et seq.*

112 Public Act 79-563, Conn. Gen. Stat. Ann. § 36-5(b). The Commission consisted of leading legislators, distinguished lawyers, a former banking commissoner and prominent bankers. JA (2d Cir.) 1229.

113 JA (2d Cir.) 1240-41.

114 *Id.* at 1240.

115 *Id.* at 1242.

116 *Id.; accord id.* at 1241 ("By 'experiment' we mean a first step toward interstate banking that would allow limited entry by out-of-state banking organizations and would afford the legislature an opportunity to make its own calculus of the benefits and detriments that might result from a broader program of interstate banking").

117 The wisdom of providing Connecticut with a limited experiment to test the desirability of interstate banking was the subject of extensive debate. JA (2d Cir.) 1245-87, 1288-1372. Thereafter, the Senate rejected an amendment which would have struck the geographic feature by authorizing the acquisition of Connecticut institutions by any out-of-state bank holding company, wherever located, whose home state provided reciprocal acquisi-

What petitioners pejoratively dismiss as protectionist in this approach is none other than the fulfillment of Congress' design. For Connecticut's and Massachusetts' desire to foster and maintain some element of local orientation within their respective banking systems is entirely consistent with the Douglas Amendment's fundamental purpose of enabling states to control their banking systems' development and thereby to keep alive the tradition of banks indigenous to, familiar with, and attentive to the needs of, the local communities.[118] Such state efforts are not, however, consistent with the interests of our nation's largest banks—as this case itself makes abundantly clear. If the essential purpose of the Douglas Amendment is given effect here and the challenged statutes are sustained, local banking organizations based *outside* the principal money centers will inevitably grow and become much more serious threats than they are or can be today to major money-center financial organizations.[119] The net result will be increased competition for the nation's largest financial organizations in the evolving interstate environment that those organizations currently dominate and would like to continue to dominate.

It is undoubtedly for this reason that the petitioners take pains to obscure the fact that the immediate effect of a decision in their favor here would *not* be to remove restrictions

tion opportunities for Connecticut banking organizations. JA (2d Cir.) 1276-82. Both houses also rejected amendments under which the geographic feature would have expired *automatically* after two years. JA (2d Cir.) 1311-20.

118 In fact, Congress itself, in recently providing federal authority for interstate acquisitions in the narrow context of failing federally-insured banks (see pp. 43-44, *infra*), also adopted a regional approach that reflects its continuing concern with the maintenance of locally-controlled and community-oriented institutions: Congress specified that the Federal Deposit Insurance Corporation, in the event no offer from an in-state bank is made, shall consider offers by out-of-state institutions to acquire a failing federally-insured bank, and "shall give priority to offers from [institutions based in] adjoining States." 12 U.S.C. § 1823(f)(6)(C).

119 At present, petitioner Citicorp has more than three times the assets of *all* six New England banking organizations involved in the challenged transactions and, through its subsidiaries, has total deposits over 30 percent greater than the combined deposits of all the commercial banks in all of the New England states. Connolly Affidavit, Jt. App. A22-A23.

on their interstate expansion but rather to reimpose restraints on the growth of competitors, such as the private respondents. Thus, if the Connecticut and Massachusetts Acts were invalidated, the Douglas Amendment's general prohibition on interstate acquisitions would once more be fully operative in those states, and the development of Connecticut and Massachusetts banking organizations would be restricted accordingly. In such an environment, it is the large money-center financial organizations that would be left to flourish in "unequal races,"[120] unchallenged by developing organizations based elsewhere. That result would stand the Douglas Amendment on its head.

III. THE MASSACHUSETTS AND CONNECTICUT ACTS NEITHER CONSTITUTE NOR REFLECT AN INTERSTATE COMPACT REQUIRING CONGRESS' EXPRESS APPROVAL.

Petitioners argue that the Massachusetts and Connecticut Acts are part of an "exclusionary" New England compact invalid under the Compact Clause for lack of specific congressional approval. But the Acts create no new regional structure, mount no challenge to federal supremacy, and effect no change in the political relationship among the several states. Indeed, petitioners' portrayal of the Massachusetts and Connecticut Acts as part of an exclusionary group "boycott" disregards the fact that the reciprocity provisions of the challenged statutes, from which petitioners infer an "agreement," do not exclude non-New England bank holding companies; the Douglas Amendment does that.

A. The Massachusetts And Connecticut Acts In No Way Alter The Balance Between Federal And State Powers.

This Court has held that the only interstate arrangements that require congressional approval under the Compact Clause are those which tend to increase the political power of the states in a manner that encroaches upon or otherwise interferes with the just supremacy of the federal government. *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 471 (1978); *Virginia* v. *Tennessee*, 148 U.S. 503, 519

120 See n. 42.

(1893). The Massachusetts and Connecticut Acts do neither, even assuming *arguendo* that they are part of a New England agreement. Thus, they do not require specific after-the-fact approval from Congress.[121]

1. No Third Level Within The Federal Structure Has Been Created.

In *Multistate Tax Commission*, some 21 states had adopted legislation establishing a "Multistate Tax Compact" to coordinate the taxation of businesses that generate income in several states. The legislation created a commission composed of the member states' tax administrators, and empowered it to study state tax systems, develop proposals for uniform state tax laws, adopt advisory uniform administrative regulations, and conduct audits on behalf of member states.

In rejecting a Compact Clause challenge, this Court concluded that the legislation—notwithstanding its creation of a multistate authority—did not enhance the political powers of

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121 Here, as in *Multistate Tax Commission*, Congress has not yielded to requests to bless the challenged statutes in *haec verba*. Since even the proponents of such legislative initiatives did not believe them necessary in light of the authorization already conferred upon the states by the Douglas Amendment itself, all of petitioners' declamations about the negative implications of what Congress did *not* do add up to nothing. In reporting out the Garn bill, which was passed by the Senate by an 89-5 vote on Sept. 13, 1984, and not acted upon by the House, the Senate Committee on Banking and Currency stated that it "believes that the state statutes concerning interstate banking [such as the Connecticut and Massachusetts Acts] are consistent with both the constitution and the federal banking statutes . . . ." S. Rep. No. 98-560, 98th Cong., 2d Sess., 49 (1984). During the Senate floor debate on the bill, proponents made clear that it was "merely a clarification of the powers that the States have always retained under the Douglas Amendment. . . ." 130 Cong. Rec. 11153 (1984)(prepared statement of Sen. Garn); *accord id.* at 11153 (prepared statement of Sen. Tsongas).

In any event, this Court has long recognized that unenacted legislative proposals do not provide a reliable guide to the meaning of an existing law enacted by a prior Congress. *E.g.*, *Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981). Nor is congressional inaction on such a proposal significant, for Congress may well have concluded that the existing law is adequate and requires no revision. *See, e.g.*, *American Trucking Ass'ns* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416-18 (1967).

the compacting states in a manner that impinged upon the powers of the federal government:

> This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, . . . each state is free to withdraw at any time.[122]

All of this is, of course, true in the present case. Indeed, the statutes of Massachusetts and Connecticut present a far less serious Compact Clause issue than did the legislation upheld by this Court in *Multistate Tax Commission*. Massachusetts and Connecticut have created *no* independent multi-state authority with power to *do* or even *study* anything.[123] The banking organizations that result from the transactions at issue would each consist, in essence, of a bank holding company with separate, wholly *intrastate*, banking subsidiaries.[124] Each state would continue to regulate—to the extent presently permissible—the operations and acquisitions of banking institutions found within its borders using its own existing regulatory framework and banking officials. And the federal government,

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122 434 U.S. at 473.

123 The Acts not only fail to create any regional authority, they do not even establish a homogeneous New England banking region. The various New England states have exercised their prerogatives under the Douglas Amendment in varying manners: one state permits acquisitions by out-of-state bank holding companies throughout the nation; three others permit such acquisitions on a regional basis, although one of the three will soon expand its permission to encompass non-New England bank holding companies; and the remaining two do not permit interstate acquisitions at all. See pp. 6-7, *supra*.

124 Under the provisions of federal banking law, national banks and member banks of the Federal Reserve System may not branch outside their home state, nor may national banks consolidate with other national or state banks located outside their home state. See n.31; *accord* Conn. Gen. Stat. Ann. § 36-59 (only in-state banks may open branch offices in Connecticut); *id.* §§ 36-92, 36-93 (only banks located within the state may be merged or consolidated).

acting through the Board, would continue to regulate all bank holding company acquisitions in precisely the same manner as prior to the enactment of the challenged statutes.

Massachusetts and Connecticut have thus exercised their own sovereign power without attempting to confer even a semblance of sovereignty upon a third level of government. As in *Multistate Tax Commission*, each state is free unilaterally to terminate its legislation at any time. Thus, the Massachusetts and Connecticut Acts—like the arrangement in *Multistate Tax Commission*—clearly were not intended to, and do not, increase the cumulative power of the purportedly "compacting" states.

Nor can *Multistate Tax Commission* be distinguished on the ground that the arrangement there was open to all states. Whether an exclusively regional multistate *agency*, with authority to take at least some kind of *action* with regard to an important governmental function such as taxation, would have satisfied the Compact Clause is not a question presented in this case; the Acts in no sense address the relationships among states as governmental units. They concern only the powers of *private parties*. In any event, no arrangement between Massachusetts and Connecticut, and nothing in either state's laws, purports to prevent the other state from extending the benefits of reciprocal interstate bank acquisitions to holding companies outside New England.[125]

There is, finally, no substance whatever in petitioners' attempt to distinguish *Multistate Tax Commission* on the ground that, there, the "potential harmful effects" of the multistate legislation "could have been imposed" on appellants "without entering into an agreement."[126] That is equally true in this case. For example, had only Massachusetts (or only Connecticut) enacted a regional bank acquisition statute, or had both enacted such statutes with no reciprocity provisions,[127] peti-

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125 See pp. 46-47, *infra*.

126 CitiBr. at 44; NEBr. at 36.

127 It is settled that the enactment of reciprocal legislation does not in itself create a compact. *See United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. at 469-70; *Bode* v. *Barrett*, 344 U.S. 583, 586 (1953); *New York* v. *O'Neill*, 359 U.S. 1, 9-10 (1959).

tioners would complain of precisely the same "exclusion." Thus the exclusionary effects of which petitioners complain have no relationship to any conceivable "agreement."

2. There Is No Encroachment Upon Federal Interests.

The only examples petitioners offer to suggest that the Massachusetts and Connecticut Acts encroach upon the federal government's regulation of banking cannot withstand analysis. The federal government's interest in regulating bank acquisitions is spelled out in Section 3 of the BHC Act. Section 3(c) requires that the Federal Reserve Board, before approving a bank acquisition, consider the competitive effects of the acquisition, the financial and managerial resources of the acquiring company, and the needs of the communities to be served. 12 U.S.C. § 1842(c). The Board must make favorable determinations on each factor before approving any interstate or intrastate bank acquisition. That the Massachusetts and Connecticut Acts do not interfere in any way with the Board's fulfillment of this federal function is demonstrated by the fact that the Board was able to make the required findings in this case.[128]

The Acts surely do not interfere with any federal interest in the extent to which interstate bank acquisitions are permitted. Under the Douglas Amendment, these state policy determinations have been made controlling for federal purposes.[129] Because the Acts *embody* the federal interest in interstate bank acquisitions, they cannot *encroach* upon it. It is in this sense that the Board, in rejecting petitioners' Compact Clause claim, described the Douglas Amendment as a congressional "renunciation of federal interest in" regulating the permissibility of interstate bank acquisitions.[130]

Petitioners' further claim that the Acts conflict with a federal failing bank statute is little short of frivolous. The relevant federal statute contemplates that the Federal Deposit

128 Pet. App. A41-A48, A75-A78, A80-A82.

129 See pp. 18-20, *supra*.

130 Pet. App. A52.

Insurance Corporation ("FDIC") will arrange acquisitions of failing or failed banking institutions by out-of-state bank holding companies where in-state alternatives are unavailable or unsatisfactory.[131] The statute explicitly overrides the Douglas Amendment and "any other provision of law, State or federal," to the contrary.[132] Because the federal statute expressly renders the Massachusetts and Connecticut Acts inapplicable where they otherwise might conflict with it, there is no potential for interference by the Acts.[133]

B. The Massachusetts And Connecticut Acts Do Not Affect Other States In A Manner That Implicates The Compact Clause.

1. The Connecticut And Massachusetts Acts Do Not Affect Any State's Sovereignty.

Petitioners argue that the Massachusetts and Connecticut Acts "pose[ ] a direct affront to the sovereignty of excluded sister states."[134] But nowhere do petitioners explain how or in what manner any state's sovereignty is affected by the Massachusetts or Connecticut Acts. Unlike the compacts addressed by the Framers, which resolved state boundary disputes raising fundamental issues of sovereignty,[135] the Acts challenged here deal only with *private* corporate transactions far removed from sovereign affairs. Indeed, this Court has expressly ruled that no approval by Congress is required under the Compact Clause where "legislation on the part of two or more States" reciprocally permits corporate entities of each state to enter the other.

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131 12 U.S.C. § 1823(f), enacted as part of the Garn-St Germain Depository Institutions Act of 1982 (*also discussed* at n. 118).

132 12 U.S.C. § 1823(f)(4)(i).

133 In the event of any putative conflict, the FDIC could proceed with a proposed acquisition, confident that the Massachusetts or Connecticut Acts would be preempted to the extent necessary by federal law. *See Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 152–53 (1982).

134 CitiBr. at 41-42; *accord* NEBr. at 3, 31.

135 *See* CitiBr. at 38; NEBr. at 34; Acts Passed At a General Assembly of the Commonwealth of Virginia, October Session 1785, at 15.

St. Louis & San Francisco Ry. Co. v. *James*, 161 U.S. 545, 562 (1896) (*cited in United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. at 469, and *Bode* v. *Barrett*, 344 U.S. at 586).

In the absence of any impact on other states' sovereignty, the "exclusion" about which petitioners complain is simply not subject to Compact Clause review. This Court has confirmed repeatedly that the Compact Clause defines "the proper balance between federal and state power."[136] Accordingly, "the relevant inquiry must be one of impact on our federal structure"; the "test is whether the [Acts] enhance[ ] state power *quoad* the National Government."[137] State legislation purporting to determine the internal boundaries of the Union, or addressing issues similarly affecting the very scope of state sovereignty, might well require Compact Clause scrutiny insofar as such statutes reshape the federal structure. Yet respondents have been unable to find *any* case in which this Court has held even such state legislation to constitute an unauthorized "Agreement or Compact." The case at hand is an extraordinarily inappropriate vehicle in which to depart from that unbroken tradition. For this Court has never held, and neither its precedents nor the historical underpinnings of the Compact Clause remotely suggest, that state legislation governing private corporate transactions has *any* impact on our federal structure sufficient to implicate the Compact Clause.[138]

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136 *E.g.*, *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. at 471.

137 *Id.* at 471, 473. Indeed, the very reason for the requirement that compacts be approved by *Congress*—rather than the states—is "to check any infringement on the rights of the *national* government." J. Story, Commentaries on the Constitution ¶ 1403 (1833) (emphasis added).

138 It cannot aid petitioners' cause to recall the internecine struggles which plagued the nation under the Articles of Confederation, and which led, in the commercial context, to the adoption of the Commerce Clause. *See*, *e.g.*, CitiBr. at 38-39; NEBr. at 13. For the Constitution's solution to that problem was to place interstate commerce in the hands of the national legislature, and in the instant case it is Congress itself which has determined that the norm of national unity does not best serve the national interest in the field of bank acquisitions. See pp. 11-15, *supra*. Thus, fears of state-imposed

2. *The Exclusionary Effects Of Which Petitioners Complain Do Not Derive From Any Purported "Agreement" Between Connecticut And Massachusetts.*

At bottom, petitioners' Compact Clause arguments rest on the notion that Massachusetts and Connecticut have formed an exclusionary "confederation[ ] to boycott sister states."[139] That notion is rhetoric, not reality. Even assuming that some of the New England states might be deemed to have "agreed" to open their borders to each other's bank holding companies,[140] there is no conceivable basis for inferring an *agreement* among them to *exclude* bank holding companies of other states.

Neither the Connecticut nor the Massachusetts Act requires, as a condition of reciprocity, that other states' interstate banking statutes include a regional limitation.[141] The reciproc-

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national division are irrelevant. Indeed, Massachusetts and Connecticut, by exercising the power conferred upon them in the Douglas Amendment, have moved in the direction of more, not less, national unity.

139 CitiBr. at 12; *accord id.* at 5-6, 36; NEBr. at 3, 32.

140 The spectre of conspiratorial confederation conjured by petitioners cannot be made into a concrete constitutional challenge by their energetic invocation of metaphors drawn from antitrust law. Even a less allegorical antitrust assault on what Massachusetts and Connecticut have done could hardly surmount this Court's holding that the Sherman Act has no application to state action with nationwide anticompetitive effects. *Parker* v. *Brown*, 317 U.S. 341, 350-52 (1943). Quite apart from the fact that petitioners' insinuations of boycott are chronologically unfounded (*see* pp. 6, 36-37, *supra*), it simply cannot be the law that otherwise valid state enactments may be fatally infected by showing that those who drafted or sponsored them acted with eyes over one anothers' shoulders. No conception either of the respect due the sovereign states, or of the institutional limits of the federal judiciary, could possibly warrant a new Compact Clause doctrine requiring this Court—or Congress, for that matter—to probe the deliberative process leading to the enactments of otherwise valid state laws in order to condemn statutes whose structure and impact, viewed without regard to such imaginative musings, would leave them invulnerable to this sort of attack.

141 Nor have Massachusetts and Connecticut sought to induce each other—or any other state—to exclude non-New England bank holding companies. The reciprocity provision of each statute merely provides an inducement for other New England states to *open* their borders to the bank holding companies of Massachusetts or Connecticut.

ity accorded to the bank holding companies of Maine—which allows acquisitions of its banks by bank holding companies located in New York and elsewhere—demonstrates that the exclusion of non-New England bank holding companies does not derive from any purported "agreement" between Massachusetts and Connecticut.[142]

To the extent that bank holding companies outside New England may be barred from acquiring Connecticut or Massachusetts banks, that *exclusionary* effect derives from the Douglas Amendment—and, even under petitioners' theory, would derive from the legislation that the two individual states enacted, with or without reciprocity, and not from any agreement between them. While the purportedly exclusionary effects that result from the interaction of federal and state law could be thought to raise an issue under the Commerce Clause but for the Douglas Amendment, they plainly do not implicate the Compact Clause. As petitioners themselves concede, when "the individual states could have imposed identical effects . . . without entering into an agreement," there can be no violation of the Compact Clause.[143]

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142 Similarly, the Massachusetts and Connecticut Acts permit interstate acquisitions between banking institutions in either of those states and Rhode Island, even though Rhode Island will permit entry by non-New England bank holding companies after June 30, 1986. See p. 6, *supra*.

143 CitiBr. at 44, *citing Multistate Tax Commission*, 434 U.S. at 478 ("risk of any potential harmful effects was 'independent of the Compact' "); *accord* NEBr. at 36.

Conclusion

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

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